



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77844; File No. SR-FINRA-2016-015]

### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Amending Rule 12904 (Awards) of the Code of Arbitration Procedure for Customer Disputes and Rule 13904 (Awards) of the Code of Arbitration Procedure for Industry Disputes to Permit Award Offsets in Arbitration**

May 17, 2016

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 3, 2016, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

FINRA is proposing to amend Rule 12904 (Awards) of the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and Rule 13904 (Awards) of the Code of Arbitration Procedure for Industry Disputes (“Industry Code”) (together, “Codes”) to provide that absent specification to the contrary in an award, when arbitrators order opposing parties to pay each other damages, the monetary awards shall offset, and the party that owes the larger amount shall pay the net difference.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

FINRA Rules 12904 and 13904 address awards issued by arbitrators at the FINRA Office of Dispute Resolution forum. They provide, among other matters, that awards must be in writing and signed by a majority of the arbitrators or as required by applicable law. The rules itemize required elements of awards, including a statement of the damages awarded, and provide that all monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed in a court of competent jurisdiction.

Sometimes arbitrators order opposing parties in a case to pay each other monetary damages. When arbitrators make such awards, but do not specify whether the party that owes the higher amount must pay the net difference, the lack of clarity has resulted in parties asking arbitrators to revise an award after a case has closed or in post-award litigation. For example,

arbitrators may award damages to a firm because an associated person failed to pay money owed on a promissory note and award a lesser amount to the associated person on a counterclaim. The firm is willing to accept the net payment due. However, if the arbitrators do not specify that awards should be offset, the firm may be required to pay the counterclaim even if the associated person refuses or is unable to pay the larger amount. The offset issue could also arise in customer cases, such as those involving margin account disputes. Currently, Rules 12904 and 13904 are silent on award offsets. Therefore, under the current Codes, FINRA does not require arbitrators to specify whether parties should offset amounts awarded.

For example, in UBS Financial Services, Inc. (UBS) v. Thomas A. Mann (Mann), No. 2:2014cv10621, 2014 WL 1746249 (E.D. Mich. Apr. 30, 2014), a federal district court heard a dispute relating to opposing awards made by a FINRA arbitration panel involving forgivable loans the firm made to Mann, an associated person. The arbitrators awarded UBS \$217,000 and awarded Mann \$150,000 for claims relating to his employment. *Mann*, 2014 WL 1746249 at \*1. “UBS expressed concern it would never receive payment from Mann, but still had to pay him.” *Id.* Under the current Codes, the failure of a firm or person registered with FINRA, such as UBS, to pay an award within 30 days could subject that firm or person to FINRA disciplinary action, including cancellation of membership for the firm or suspension of the firm or person. UBS filed a motion to the arbitrators to correct the award because it was ambiguous in not providing for an offset. *Id.* In that motion, UBS argued that the award should be \$67,000 in its favor, which is the difference in the amount of the two awards. *Id.* The arbitrators declined the request. *Id.* UBS asked the court to provide for an offset of the awards. *Id.* at \*2. The court confirmed the award without ordering an offset because the arbitrators had an opportunity to review UBS’ request for an offset and chose not to address it in the award. *Id.* at \*3.

## **Proposed Amendments to Rules 12904(j) and 13904(j)**

FINRA is proposing to amend Rules 12904(j) and 13904(j) to provide that, absent specification to the contrary in an award, when arbitrators order opposing parties to pay each other damages, the monetary awards shall offset, and the party that owes the larger amount shall pay the net difference. FINRA is also proposing to replace the bullets in Rules 12904 and 13904 with numbers because forum users have indicated that for ease of citation, they would prefer that FINRA use numbers and letters instead of bullets.

As noted in Item 2 of this filing, if the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the Regulatory Notice announcing Commission approval.

### **2. Statutory Basis**

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>3</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that providing a default in favor of offset when arbitrators fail to address the issue in an award would benefit forum users by eliminating ambiguity and reducing the risk of post-award disputes.

#### **B. Self-Regulatory Organization's Statement on Burden on Competition**

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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<sup>3</sup> 15 U.S.C. 78o-3(b)(6).

FINRA believes that the proposed rule change will mitigate the risk of failure to pay by an opposing party that may arise when multiple parties in a dispute are found to owe non-equivalent awards simultaneously. Creating a presumption that opposing award amounts will be offset will increase the likelihood that the arbitrators' purpose in issuing opposing awards would be carried out. In addition, the proposed rule would reduce instances where the party owed the greater net damages is required to make payment even if the opposing party fails to pay its damages. In addition, this proposed rule change would likely reduce legal expenses to the party owed greater damages by eliminating the need to apply for the reopening of the case or going to court to seek award offsets, or seek other redress.

The scope of cases affected by offsets is small in comparison to the number of cases handled at the forum, but forum users have asked FINRA to address the issue. During 2013 and 2014, a total of 8,375 cases were closed at the forum (predominantly by settlement or award). The majority of cases are settled before a hearing takes place. The offset issue had the potential to arise in 299 cases (just over 3.5% of cases) where there was a claim by both a claimant and a respondent, and the case was resolved by arbitrators at a hearing on the merits. In 17 cases (0.2% of cases), the arbitrators awarded monetary damages to both a claimant and a respondent, offering the opportunity for an offset.

Of these 17 cases, one involved a customer dispute in which a member initiated a claim for breach of contract. The arbitrators made a monetary award to both the customer and firm and provided for an offset. In the remaining 16 intra-industry cases, most of which involved promissory notes, the arbitrators made an award to both the firm and the associated person. In 8 of the 16 cases, the arbitrators ordered award offsets. In the remaining eight cases, the awards were silent as to offset.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2016-015 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2016-015. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549-1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2016-015 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>4</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

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<sup>4</sup> 17 CFR 200.30-3(a)(12).

